Supreme Court, U.S.
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89-1235

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DONALD B. AND CAMILIA S. LANDER,

PETITIONERS,

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

ADDRESS OF COUNSEL:

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35 pp

QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a federal constitutional claim by a state convict which is raised for the first time in this Honorable Court?

2. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3. Do errors in the application of state laws constitute a denial of equal protection of the laws?

THE PARTIES

In the Circuit Court of Autauga County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Donald B. and Camilia S. Lander, who are Petitioners herein, as defendants, Appellant and Petitioners, respectively, and the State of Alabama, who is Respondent herein, as Plaintiff, Appellee, and Respondent, respectively.

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OPINIONS BELOW

The opinions and orders of Alabama Appellate Courts in the Petitioners' case, affirming their convictions, denying rehearing and denying certiorari are not yet reported but will be reported as follows: Landers v. State, ___ So.2d ___ (Ala. Crim. App. May 26, 1989); cert. den. No. 88-1328 (December 1, 1989)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making an alleged claim under the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this cause.

STATEMENT OF THE CASE

The Petitioners, Camilia Saliba Lander and Donald Boyd Lander, were separately indicted by the Grand Jury of Autauga County, Alabama, at the Grand Jury's Spring, 1988, Term for trafficking in cannabis in violation of Section 20-2-80(1)(a), Code of Alabama, 1975. (C.R.pp.3-6)

On March 8, 1988, the Petitioners were arraigned and entered pleas of not guilty. (C.R.pp.192-195)

On May 11, 1988, the causes came on for trial before Honorable John B. Bush, a Circuit Judge and a Jury. The Petitioners were represented by their Attorney, Honorable David S. Luker, and the State was represented by its District Attorney, Honorable Janice Clardy and her Chief Assistant, Honorable John Thornton. (C.R.pp.192 and 194 and Tr.1)

On the trial of the cause, it was proven without conflict that several large fields of marijuana and a marijuana processing structure were located on land owned by the Petitioners and occupied by them as a residence. It was stipulated that the police had seized some 102.8 ounces (6.425 pounds) of marijuana from the Petitioners' land. (C.R.118) However, the Petitioners claimed that they had no knowledge of the marijuana growing operation on their land. (Transcript generally)

On May 12, 1988, the Jury, having heard the evidence, arguments of counsel and charge of the Court, found the Petitioners guilty of trafficking in marijuana as charged in the indictments. (C.R.pp.192-195 and Tr.p.328)

On June 24, 1988, the Petitioners were adjudged guilty in accordance with the verdict. Petitioner Camilia Saliba Lander was sentenced to five years imprisonment, a fine

of $25,000.00 and ordered to pay $1,500.00 to the victims' compensation fund. Petitioner Donald Boyd Lander was sentenced to fifteen years imprisonment, a fine of $25,000.00 and ordered to pay $1,500.00 to the Victims' Compensation Fund. (C.R.pp.192-195)

Appeal followed.

On May 26, 1989, the Court of Criminal Appeals of Alabama affirmed the Petitioners' convictions. (Appendix "A", to the petition.) On June 9, 1989, the Petitioners applied for rehearing, but the same was overruled on June 30, 1989.

The Petitioners sought review in the Alabama Supreme Court by certiorari. The Appellant's certiorari petition did not meet the formal requirements of Rule 39(c), Alabama Rules of Appellate Procedure. (A.R.A.P.) Appendix "A" to this brief. Although the Petitioners raised three issues relating to the sufficiency of the evidence, none were

shown to be within the classifications set out in Rule 39(c), A.R.A.P. Nowhere did the petition present or even mention an equal protection claim. On December 1, 1989, the Alabama Supreme Court denied the writ.

STATEMENT OF THE FACTS

The Petitioners' convictions are based on the following facts:

Certain facts were and are undisputed and there is little need to burden the Court with a detailed recitation of evidence proving what is not at issue. Therefore, briefly:

On August 24, 1987, Corporal Roy Sumja, of the Alabama State Troopers, was flying, by helicopter, from Dannelley Field in Montgomery County to the Chilton-Perry County line, where some marijuana fields were reported. However, before reaching the intended search area, he observed a rather large patch of marijuana plants on Petitioners' land in

Autauga County. The plants were vary tall, 12 to 18 feet in height. Sumja contacted his ground unit, operated by A.B.I. Investigator Charles West. West entered the property through the Petitioners' driveway. Unable to raise anyone at the Petitioners' house, West passed through their yard and garden and discovered a well used trail which led to a complex of four marijuana filed. West also discovered a green-house-like drying shed and clear evidence that marijuana was being processed for illicit sale and use. Other investigators converged on the scene. Most of the marijuana was burned, but a quantity was seized for use as evidence. (Tr.pp.7-33 and 55-185)

It was stipulated that the material seized was 102.8 ounces (6.425 pounds) of marijuana. (C.R.p.118)

Ultimately, the Petitioners admitted under oath that they own and lived on this

land. (Tr.pp.271-302) However, the contention raised on appeal was that the State did not make out a prima facie case that the land where the marijuana was growing was that of the Petitioners. This fact was proven by the following evidence:

A. Since July 1, 1983, the property had been assessed for purposes of taxation to the Petitioners. (C.R.174-176 and 180 and Tr.pp.33-46 and 51-55)

B. The property had been deeded to the Petitioners on July 1, 1983, and there was no recorded transfer of the property by them to some other person. (C.R.177-179 and Tr.46-54)

C. Fred David McGee who lives at Route 4, Box 442, Prattville, Alabama, was a neighbor of the Petitioners. He and the Petitioners share the same access drive, and their mail boxes are together on the public road. The Petitioners' mail box is marked with their nicknames, "Cam" and "Don". Mr.

McGee has seen the Petitioners drive back and forth on the access drive many times over the three years prior to trial. Although the two houses are some distance apart and Mc. McGee seldom goes up the road as far as the Petitioners' house, on the few occasions he had done so, he has observed the Petitioners at their house. (Tr.pp.185-193)

D. Inside the marijuana drying shed the Investigators found a small bag (State's Exhibit 41) inside a larger bag (State's Exhibit 40). State's Exhibit 41 had Petitioner Camilia Lander's nickname, "Cam", written on it. (Tr.pp.85-87)

E. Along the complex of trails connecting the four marijuana fields with each other and the Petitioners' garden, a yellow raincoat was located. On the back of the raincoat was embossed, "Don L." (R.pp.79-81)

If the Petitioners ultimately admitted owning and occupying the property, they denied

any knowledge of the marijuana growing thereon. The State's evidence of scienter was strong, perhaps conclusive, but, not withstanding his denials of knowledge, the testimony of Petitioner Donald Landers in some ways strengthened the State's position. However, the issue of a prima facie case must be decided on the basis of the State's evidence alone. Therefore, this evidence will be digested separately from that of Petitioner Donald Lander.

A. We again call the Court's attention to the evidence we digested above, proving that the Petitioners owned and occupied the property.

B. We again call the Court's particular attention to the evidence recited under II, "D" and "E", above.

C. The marijuana growing operation was quite extensive involving four separate fields and a drying shed. (Tr.pp.7-33, 55-185, and 193-223)

D. The marijuana in the fields was quite tall, some 5 to 18 feet tall. (Tr.pp.11 and 198)

E. The nearest marijuana field was only two hundred (200) yards from the Petitioners' house and the trails began at the Petitioners' garden at a point one hundred fifty (150) yards from the house. (Tr.pp.65 and 197)

F. The area of the marijuana fields was covered with heavy brush and could be accessed only by a complex of trails. These were clear, well used trails. Human footprints could be observed on them, indicating recent use by humans. The complex of trails had two terminals: one at either end of the Petitioners' garden. (Tr.pp.65-69, 101-106 and 197-203)

Although Petitioner Don Lander denied any knowledge of the marijuana growing and processing operation on his property, his

testimony is as a whole rather hard to swallow. The evidence showed without conflict that this wooded area held game, indeed the Defense tried to show that the trails giving access to the marijuana fields were made by deer, turkeys, etc. (Tr.pp.158-159) Landers claimed he often had to drive stray hunters from his land. (Tr.277) Landers hunts deer and turkey. (Tr.p.285) Apparently, he only hunted on other peoples' land. Lander claimed that, in addition to the hunters, previously mentioned, he often had to force teenage dirt bikers from the property. (Tr.p.277) He claimed that the embossed raincoat and bag marked "Cam" were stolen from a storage shed on his property. (Tr.pp.271-293)

ARGUMENT

We see no point in burdening this Honorable Court with extended argument on obvious points.

The Alabama Supreme Court was given no opportunity to consider the equal protection claim which the Petitioners seek to raise here. Therefore, certiorari, under 28 U.S.C. 1257, does not lie to review it. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Rotary International v. Rotary Club, 481 U.S. 537, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987).

The Petitioners made no effort to comply with the requirements of Rule 39 A.R.A.P, appendix. Thus, they denied the Alabama Supreme Court of any real opportunity to review the claims they did present. Therefore, the claim was not presented to the State Supreme Court and certiorari, under 28 U.S.C. 1257, does not lie to review it.

Cardinal v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969)

Under the plain words of 28 U.S.C. §1257(3), the State Supreme Court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address such an issue, it is presumed that the issue was not properly before that Court. Rotary International v. Rotary Club, 481 U.S. 537, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987); Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983) n. 3; Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioners made no pretense of presenting a federal claim in state court.

Addressing the merits briefly, it is obvious that the Petitioner is arguing that possible misapplications of state law in other cases have deprived him of equal protection of the law. This does not even present a claim of constitutionally prohibited discrimination. Beck v. Washington, 369 U.S. 541, 554-555, 8 L.Ed.2d 98, 110 82 S.Ct. 1575 (1962); Martin v. Walton, 368 U.S. 25, 26, 7, L.Ed.2d 5, 6, 82 S.Ct. 376 (1961).

CONCLUSION

In conclusion, the Respondent respectfully submits that the claim the Petitioner seeks to raise is not properly before the Court and is, in any event, a claim with no basis in fact or law.

Respectfully submitted,

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APPENDIX

RELEVANT ALABAMA COURT RULES

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue,or decision complained of, except that, in the case of a pre-trial appeal by the state in a criminal case, either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (2 weeks) after the decision of court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within 7 days (1 week) of the judgment of the court of criminal appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been

replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class of constitutional, state, or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeal; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled ~~which~~ were followed in the decision of the court of appeals.

(d) Form of Petition. The petition shall be on legal-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the

petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based; and,

(4) A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit.

(e) Service. Nine copies of the petition and briefs shall be filed with the clerk of the Supreme Court, one copy with the clerk of the appropriate court of appeals, and one copy shall be served on each party to the proceeding in the court of appeals including those not joining in the petition.

(f) Briefs. Petitioner's brief shall be on the same size paper and bound as briefs for appeals and shall accompany the petition for writ of certiorari. No more briefs will be required of petitioner, although he may file an answering brief within 14 days (2 weeks) --or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receipt of respondent's brief. Within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case within 7 days (1 week)--after service of the petition and brief by petitioner, the respondent may file an initial brief limited solely to the issue of whether or not any of the grounds set forth in (c) (1)-(5) authorize the granting of a writ. Thereafter, if the writ should be granted, the respondent may file a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of

certiorari, within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after notice that the writ has been granted. Nine copies of the reply brief shall be filed with the clerk of the supreme court and one copy shall be served on the petitioner or his attorney. No more shall be required of respondent.

The work "brief" as used in this rule includes an appendix where brief and appendix were employed by the party in the court of appeals.

(g) Action on Petition. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the clerk of the appropriate court of appeals. The record, one copy of the

briefs,and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Oral Argument. There will be no oral argument on preliminary examination. In the event the writ is granted, oral argument may be requested in writing by either party within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receiving notice of the granting of the writ. A copy of the request shall be served on the adverse party.

(i) Submission. If either party shall have made known a desire for oral argument, the clerk of the supreme court shall endorse that fact on the proper docket and, if oral argument is not determined under the criteria of Rule 34 to be unnecessary, shall set the case down for oral argument not less than 14

days (two weeks) after notifying the parties, or their attorneys or record, in writing of such setting. If neither party shall have requested oral argument,as herein provided, or if the supreme court shall have determined oral argument to be unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case upon the record, briefs, and appendices, if any.

(j) Rehearing. No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement

of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error of defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason

thereof, whenever such error has or probably has adversely affected the substantial rights of petitioner.

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week)after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief

opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.

CERTIFICATE OF SERVICE

I, P. David Bjurberg, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 12 day of February, 1990, I did serve the requisite number of copies of the foregoing on the Attorney for Donald B. and Camilia S. Lander, Petitioners, by mailing the same to said Attorney, first class postage prepaid and addressed as follows:

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